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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell, Pacific Bell and Nevada Bell Joint Petition for Stay	)	CC Docket No. 96-45
	)	
	)	
	)	

To: The Commission

COMMENTS OF CELPAGE, INC. IN SUPPORT OF JOINT PETITION FOR STAY PENDING JUDICIAL REVIEW

Frederick M. Joyce
Christine McLaughlin
Its Attorneys

JOYCE & JACOBS, Attys. at Law, L.L.P.
1019 19th Street, N.W.
Fourteenth Floor - PH2
Washington, DC 20036
(202) 457-0100

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SUMMARY

Celpage supports Petitioners' request to stay the Universal Service Report & Order in its entirety. The Petition makes the requisite showing for a stay pending judicial review. Additionally, the grounds underlying Celpage's petition for review (which has been consolidated with the petitions for review filed by Petitioner Southwestern Bell and others) also meet the four-part test for a stay of the Universal Service rules.

Celpage is likely to succeed on the merits of its appeal. In requiring paging carriers to contribute to the Universal Service Fund at the same rate as other carriers, even though paging carriers alone can never receive support from the Fund, the FCC violated Congress' explicit command that support obligations be "equitable and non-discriminatory". Indeed, Members of Congress expressly informed the FCC that imposing full contribution obligations on paging companies did not comport with Congress' view of an "equitable and non-discriminatory" contribution scheme. The FCC's failure to adopt rules consistent with Congressional intent, or to even address the record evidence on that issue, was arbitrary and capricious. Moreover, the FCC's treatment of paging companies is directly contrary to the FCC's own finding that the Universal Service program should be "competitively neutral." By supporting only services that paging carriers cannot provide, while compelling them to fully contribute to the Fund, the FCC is ordering paging companies to subsidize their competitors.

The Universal Service is an enforced contribution of money from private parties for public purposes; it is a "tax," regardless of what the FCC may choose to call it. Since the effect of this tax is to burden paging carriers wholly without relation to any "benefits" received by them, it is a violation of equal protection. In addition, since paging rates are so price-sensitive,

paging carriers' Universal Service contributions will be largely unrecoverable. The FCC's rules therefore deprive paging carriers of any return on their investments, and in many cases will require them to operate at a loss; the rules are confiscatory and result in a taking of paging carriers' property in violation of the Fifth Amendment.

Unless a stay is granted, Celpage and other paging carriers will suffer irreparable harm. Paging carriers will be required to operate at or below cost; attempts to pass through the costs of Universal Service contributions to subscribers will result in the loss of those subscribers to two-way carriers who can recover their costs from the Fund. The economic loss suffered by paging carriers will be unrecoverable, and may jeopardize the ability of paging companies to continue as going concerns. Unrecoverable loss of customers and customer goodwill, and economic loss which threatens the existence of a business, have long been recognized as irreparable injuries that warrant a stay.

In contrast, no third parties will be harmed by a stay; indeed, third parties will benefit. In particular, many paging customers rely on paging services because the costs are so low; for many financially needy persons, paging is their only link to the nation's telecommunications network. Any rate increases due to Universal Service contributions will likely place even paging services beyond the reach of these low-income consumers; to the extent that paging carriers are driven out of business by unrecoverable costs, those consumers will also be deprived of necessary services. In light of the harm to paging companies, to competition in the telecommunications industry, and to consumers that will result from the FCC's Universal Service regime, a stay will clearly serve the public interest.

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To: The Commission

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Celpage, Inc. ("Celpage"), by its attorneys and in accordance with the Commission's Public Notice released July 9, 1997, hereby submits these comments in support of the "Petition for Stay Pending Judicial Review" (the "Petition"), filed on July 3, 1997 by Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell ("Petitioners"). In support hereof, the following is respectfully shown:

I. Background

Celpage, through its wholly-owned subsidiaries, provides paging services throughout the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Celpage is the second largest paging company in Puerto Rico; the largest is a wholly-owned subsidiary of the Puerto Rico Telephone Company, the incumbent local exchange carrier in Puerto Rico.

Celpage was a commenter in the Commission's rulemaking proceeding to implement Section 254 of the Telecommunications Act of 1996 (the "Telecom Act"), which substantially revised the regime to support Universal Service. Celpage vigorously protested proposals by the Commission to require paging companies to contribute to the proposed Universal Service Fund on the same basis and at the same rate as other carriers, for two fundamental reasons. First,

unlike all other telecommunications carriers, paging carriers will never be able obtain support from the Fund, because their small channel allocations and the technical rules applicable to the service prevent paging companies from offering the services which the FCC included in the definition of Universal Service. Second, because paging technology is one-way, paging companies due not receive the same benefits from -- or place the same burdens on -- the public switched telephone network as other carriers.

The Report and Order in this proceeding was released on May 8, 1997 and published in the Federal Register on June 17, 1997. See *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order in CC Docket No. 96-45, 62 Fed.Reg. 32862 (June 17, 1997) (the "Report & Order"). Celpage immediately thereafter filed a Petition for Review of the Report & Order with the Unites States Court of Appeals for the District of Columbia Circuit. GTE Midwest Incorporated and Petitioner Southwestern Bell Telephone Company each filed Petitions for Review with the United States Court of Appeals for the Eighth Circuit; the Texas Office of Public Utility Counsel filed a Petition for Review with the United States Court of Appeals for the Fifth Circuit. By order of the Panel on Multidistrict Litigation on July 1, 1997, these cases have been consolidated in the Fifth Circuit. There are motions pending to transfer the consolidated appeals to the Eighth Circuit.

On July 3, Petitioners filed the Petition, requesting a stay of the rules adopted in the Report & Order pending judicial review. Petitioners requested that the rules be stayed in their entirety, see Petition at 6, 8; in the alternative, Petitioners request that the specific provisions for discounts to schools, libraries and health care providers; support payments to non-telecommunications carriers; and non-termination of Lifeline subscribers, be stayed. For the

reasons stated herein, Celpage respectfully submits that the Report & Order should be stayed in its entirety. Petitioners have made a showing warranting a stay of the Universal Service rules, and, as explained in detail below, the grounds underlying Celpage's Petition for Review also warrant a stay of the rules until the Court has completed its review.

II. Standards for Stay.

A party seeking a stay pending appeal must demonstrate (1) likelihood of success on the merits; (2) that absent a stay, the movant will suffer irreparable injury; (3) that the grant of a stay will not substantially harm other interested parties; and (4) that the public interest would be served by a grant of the stay. See, *e.g.*, Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). See also, National Treasury Employees Union v. Von Raab, 808 F.2d 1057, 1059 (5th Cir. 1987); Arkansas Peace Center v. Dept. of Pollution Control, 929 F.2d 145 (8th Cir. 1993).

The test is not a mechanical one, and a precise showing of probability of success on the merits is not required. "[A] court ... when confronted with a case in which the other three factors strongly favor interim relief, may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. ... The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). See also Von Raab, 808 F.2d at 1057 ("the movant 'need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay'").

Although "[m]ere injuries, however substantial, in terms of money, time and energy" are

not sufficient to justify a stay if adequate compensatory relief is available, see Virginia Petroleum Jobbers Ass'n., 259 F.2d at 925; the fact that an injury may be classified as "economic" does not mean that it may not be "irreparable." "The destruction of a business ... is not one of the 'mere' economic injuries which ... are insufficient to warrant a stay." Holiday Tours, 559 F.2d at 843, n. 2. Loss of customers or customer goodwill, and injuries to fair competition may also constitute irreparable harm warranting a stay. See, *e.g.*, Multi-Channel TV Cable Company v. Charlottesville Quality Cable Operating Company, 22 F.3d 546 (4th Cir. 1994); Basicomputer Corp. v. Scott, 973 F.2d 507 (6th Cir. 1992).

III. The Standards for a Stay have been Met.

A. Petitioners are Likely to Succeed on the Merits.

Petitioners raise serious arguments concerning the validity of the rules establishing support mechanisms for schools, libraries and health care providers. As Petitioners request, *all* portions of universal service rules should be stayed pending appeal, since significant portions of those rules are likely to be reversed on appeal; immediate effectiveness of the rules will lead to a piecemeal regulatory scheme. See Petition at 6.

Celpage submits that, in addition to the provisions specifically challenged in the Petition, numerous other provisions of the Universal Service rules are likely to be reversed on appeal, in particular as they apply to paging companies. Consequently, since the appeals of the Report & Order filed by Petitioners and by Celpage are likely to succeed on the merits, a stay is warranted.

1. The Contribution Requirements Imposed upon Paging Carriers are Arbitrary, Capricious and Contrary to the Statute.

The FCC's failure to consider the adverse effects of Universal Service payment obligations on paging carriers was arbitrary and capricious, and in contravention of the language

and intent of the Telecom Act. Section 254 requires that the contributions of carriers be "equitable and nondiscriminatory." See 47 U.S.C. § 254(b)(4). Requiring paging companies, which cannot receive Universal Service support and which do not transmit traffic to the Public Switched Telephone Network ("PSTN"), to contribute at the same rate as other carriers is far from "equitable."

Elsewhere in the Report & Order, the FCC acknowledged that "equitable does not mean equal," Report & Order at ¶ 839; yet, the FCC imposed "equal" Universal Service burdens upon paging companies with no consideration of the inequities of doing so. That conclusion was no substitute for a thorough review of the record, and the evidence of the unique interests of paging carriers. The record amply supports reduced contributions for paging carriers. Paging carriers cannot, by definition, provide the services supported by the Universal Service Fund; however, telephone companies and two-way, broadband CMRS providers can and do provide paging services in competition with traditional one-way paging companies. Thus, unlike other carriers, paging companies will be forced to spend millions of dollars to subsidize their competitors' operations, with no opportunity to recoup any of their contributions. That is hardly "equitable."

Nor is this result "non-discriminatory," since paging companies will be placed at a disadvantage *vis*. other carriers simply because the allocational and operating rules applicable to their services do not permit them to offer services that could be supported by the Universal Service Fund. The Commission has determined that only common carriers that offer services such as single party service, access to emergency service, access to interexchange service, voice-grade access to the public switched network, and access to operator services are eligible to receive universal service support. Report & Order at ¶ 56. Paging, by the nature

of its technology, does not provide the services necessary to be eligible to receive universal service support. The Commission nonetheless requires paging carriers to contribute fully to the universal support mechanisms. Report & Order at ¶ 805. Requiring "ineligible" paging providers to contribute to the universal service fund, from which they will receive no benefit, is inequitable and discriminatory.

To the extent that there is any ambiguity in the statutory phrase "equitable and non-discriminatory," the record in this proceeding demonstrates that Congress did not intend that one-way paging services contribute to the Fund in the same manner as two-way carriers who may potentially receive support from the Fund. Indeed, members of both the House and Senate subcommittees responsible for the Telecom Act wrote to the FCC during the pendency of this proceeding, to say that requiring paging carriers to contribute to the Fund at the same rate as two-way carriers would *not* comply with Congress' conception of an "equitable and non-discriminatory" contribution scheme. See Letter from Senator John McCain, Chairman, Committee on Commerce, Science and Transportation, and Senator Conrad Burns, Chairman, Subcommittee on Communications, to Chairman Reed E. Hundt (May 1, 1997); Letter from Congressman Billy Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, to Chairman Reed E. Hundt (April 30, 1997). See also, Letter from Senator Trent Lott to Chairman Reed E. Hundt (April 25, 1997). Copies of these letters are attached hereto as Exhibit One.

An agency is bound to give effect to the will of Congress. Cf. Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 761 (6th Cir. 1995), citing Chevron USA, Inc. v. NRDC, 467 US 837, 842-843 (1984). Here, the Commission did not even address the record evidence of

Congressional disagreement with the Commission's proposed interpretation of Section 254(b)(4). The FCC's failure to even consider this record evidence of Congressional intent was arbitrary and capricious. See, *e.g.*, Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) (agency decision is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency").

In addition to arbitrarily ignoring or intentionally violating the terms of the statute, the FCC's imposition of this inequitable burden on paging carriers also violates the FCC's finding that competitive neutrality should be one of the goals of Universal Service. Competitive neutrality means that "universal service support mechanisms and rules [must] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." Report & Order at ¶ 47. The Commission disregarded competitive inequities its Universal Service rules would create, claiming that "although some paging carriers may be ineligible to receive support, all telecommunications carriers benefit from a ubiquitous telecommunications network." Report & Order at ¶ 805. That conclusion completely ignores the fact that paging carriers' forced "contributions" will subsidize services provided by two-way carriers, which are in direct competition with paging carriers. This scenario provides a distinct competitive advantage for two-way wireless and wireline providers, and favors those technologies over paging technology.

The FCC's capricious avoidance of these real allocational and technical differences among services falls far short of the reasoned decision-making required of agencies. The Commission's failure to discuss the very real differences between paging companies and two-

way carriers and to consider less burdensome contribution requirements for paging companies was arbitrary and capricious, and warrants reversal. See, *e.g.*, Cincinnati Bell, *supra*, 69 F.3d at 761 (failure of FCC to consider less drastic alternatives and explain why those alternatives were not adopted is arbitrary and capricious).

Moreover, the FCC cannot reconcile its finding that competitive neutrality is an important goal of the Universal Service rules, with its conclusion that a small group of carriers should be required to bear a disproportionate burden in funding Universal Service mechanisms. The lack of any "rational connection between the facts found and the choice made" renders the FCC's decision to exact full contributions from paging companies arbitrary and capricious. See, *e.g.*, State Farm, *supra*, 463 U.S. at 43.

2. The Universal Service Regime Implemented by the FCC is an Unlawful Tax.

Petitioners argue that the support mechanisms the FCC adopted for schools, libraries and health care providers are an unlawful and discriminatory tax. For the reasons stated in the Petition, and for the reasons argued in this proceeding by Celpage and other commenters, the Universal Service scheme adopted by the FCC is indeed a tax, and Petitioners and Celpage are likely to succeed on the merits of their tax claims on appeal.

Despite the FCC's protestations to the contrary, it is clear that the Universal Service regime adopted by the FCC has at its core the purpose of raising revenue for matters that are in the general "public good." In contrast, the prior access charge regime was upheld against a tax challenge, because those rules merely provided an apportionment of costs between interstate and intrastate telephone services, to equalize costs to consumers of using the largely inseparable telephone network among those who comprise that network. See Rural Telephone Coalition. v.

FCC, 838 F.2d 1307, 1314 (D.C. Cir. 1988). The current Universal Service scheme, on the other hand, requires interstate telecommunications carriers as an industry to pay enormous sums of money to subsidize rural and high cost area telephone services, discounted telephone services for low income consumers, discounted facilities and goods for educational services, and discounted services for rural health providers, without regard to the carrier's use of the PSTN.

This new scheme thus creates a broad and comprehensive aid program for rural areas, the poor, educational institutions, and certain health care services, substantially different in scope and nature from the regulatory regime it purportedly supplants. As worthy as those goals may be, such a broad relief mission renders the Universal Service scheme indistinguishable from any other tax used to subsidize programs for support of the common good. A tax is "taking money from the taxpayer for public purposes." See United States v. State of Maryland, 471 F.Supp. 1030, 1036 (D.Md. 1979) (finding an "environmental surcharge" on utilities to be a tax rather than a fee, because the surcharge was "an involuntary extraction by the State of money from the electric utilities" and the funds obtained were "used to finance projects which benefit the general public").

The fact that this tax is limited to supporting only "certain" activities (albeit, an *enormous* array of services) does not make it any less a tax for the benefit of the common welfare. As the courts have held, the government cannot turn a "tax" into a "fee" simply by assessing separate amounts for each government service to be supported. See United States v. City of Huntington, WV, 999 F.2d 71 (4th Cir. 1993). The court in City of Huntington found that monies assessed as a "fire service fee," or "municipal service fee" did not lose their legal character as taxes by virtue of the municipality labeling the fees based on the government services to be supported. Id. at

73-74.

In contrast to a tax, a "fee" usually indicates that the payor has received some privilege not available to the public at large; "a 'fee' connotes a 'benefit.'" See City of Vanceburg, KY v. FERC, 571 F.2d 630, 644 (D.C. Cir. 1974), quoting National Cable Television v. United States, 415 U.S. 336 (1974). Although the FCC attempts to point to some special "benefit" paging carriers will receive from the PSTN, see Report & Order at ¶ 805, that "benefit" is no different than that received by the public at large.[1]

Paging carriers have used the PSTN for decades prior to the adoption of the Report & Order; but, so too has 98% of the U.S. population. Yet, the public at large is not being required to contribute to the support of this general welfare scheme (except as hidden contributions, insofar as some carriers may be able to recover Universal Service payments through their rates). That imposition of a tax burden on a select group, wholly unrelated to any benefit received by the group so burdened, is simply unconstitutional. See, *e.g.*, Dane v. Jackson, 256 U.S. 589, 599 (1921); Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897 (10th Cir. 1947).

3. The Contribution Requirements Violate Paging Companies' Constitutional Rights.

As shown above, the FCC's Universal Service rules unfairly discriminate against paging

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[1] Cf. "The FCC's Universal Service and Access Reform Decisions" (FCC Home Page, May 1997), wherein the FCC claims that its Universal Service program will reduce costs by requiring all carriers to contribute at the same rate. The FCC also claims that its interconnection order has reduced rates that wireless carriers pay to LECs for transport and termination. That is not true. To date, only a handful of LECs have ceased charging paging carriers for LEC traffic terminated on paging networks, and none have agreed to reimburse paging companies for the costs of terminating traffic on paging networks. See *In the Matter of Request for Clarification of the FCC's Rules re: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CCB/CPD 97-24, Comments of Southwestern Bell, Pacific Bell and Nevada Bell (filed June 13, 1997).

carriers by requiring them to subsidize other, in many cases competing telecommunications services. Indeed, Petitioners note that the Commission's rules for support of schools and libraries would require telecommunications companies, including paging companies, to subsidize non-carriers. Unlike all other affected parties, paging carriers may not recoup their contributions to the Fund in the form of support payments. The FCC has defined "Universal Service" to include only services which paging carriers cannot provide over their allocated 25 kHz channels.[2]

While the Commission may have wide latitude in adopting regulations, in order for a regulation to pass muster under the "equal protection" component of Fifth Amendment due process, it must be rationally related to a legitimate government objective. See, e.g., Williams v. Vermont, 472 U.S. 15 (1985) (state use tax, which applied to some residents and not others, violated equal protection where the Court could "perceive no legitimate purpose ... that is furthered by" the discriminatory provisions). The FCC's treatment of paging companies in this proceeding wholly fails to meet the minimum requirements of rationality. As demonstrated by paging carriers throughout this proceeding, there is simply no reason to require one-way paging carriers to contribute to the Universal Service Fund at the same rate as two-way carriers. The FCC has designed its Universal Service rules to support only services that paging carriers cannot provide, but offered no plausible justification for requiring paging carriers alone to make full contributions to a program from which they can never benefit. Moreover, as one-way carriers, paging companies do not receive the same benefits from interconnection to the PSTN that two-

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[2] Under the FCC's definition, the services to be supported as "Universal Service" are single party service, access to emergency service, access to interexchange service, voice-grade access to the public switched network, and access to operator services; only those services are eligible to receive universal service support. Report & Order, ¶ 56.

way carriers do. Indeed, Celpage previously explained to the FCC that expansion of the pool of calling parties will actually impose additional costs on paging carriers, without countervailing gains. See Celpage Reply Comments at 3. The FCC has not provided any reasons for visiting these inequities on paging carriers; indeed, the Report & Order barely recognizes that any inequities exist. See Report & Order at ¶¶ 805, 809.

There is also substantial record evidence, not addressed by the FCC, that the imposition of full Universal Service contribution requirements on paging carriers will be so confiscatory as to violate the Fifth Amendment's prohibition on taking of private property for a public purpose without just compensation. It is fundamental that for a tax to be Constitutional, a compensating benefit must be returned to the taxpayer from the taxing authority. See, Dane v. Jackson, 256 U.S. 589 (1921); Wisconsin v. J.C. Penny Co., 311 U.S. 435 (1940); and Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897 (10th Cir. 1947). In addition, "if the taxing power be in no position to render services or otherwise to benefit the person or property taxed, . . . the taxation of such property . . . partakes rather of the nature of an extortion than a tax, and has been repeatedly held . . . to be beyond the power of the legislature and a taking of property without due process of law." Union Refrigerator Transit Co. V. Kentucky, 199 U.S. 194, 202 (1905). The Constitution "does not require that the taxpayer receive a sound bargain or strict *quid pro quo* in services provided for taxes paid; but, it does prohibit the imposition of a tax when no benefits whatsoever are returned to the taxpayer or when the benefits returned are negligible." Myles Salt Co., *supra*, 239 U.S. at 485.

As indicated, *supra*, paging carriers do not "benefit" from the expansion of the PSTN in a manner different from the population at large. A paging message travels only one way on the

PSTN -- from a telephone customer (a customer of the local telco, *not* of the paging carrier) to the paging carrier's network. The message is then carried and terminated on the paging carrier's facilities; those facilities do not interconnect with the PSTN to relay a message back to the caller. It is axiomatic that the takings clause of the Fifth Amendment protects against the imposition of burdens on a select few that should properly be borne by the public as a whole. See, *e.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960). By imposing a burden on paging carriers that is so disproportionate to any benefit received by them, as distinguished from other members of the public, the FCC's Universal Service regime constitutes a taking of paging carriers' property; that scheme also expressly provides that paging carriers will receive no compensation ("just" or otherwise) for their property so taken.

As Celpage and other commenters explained, paging is the most competitive of all telecom services. Paging rates allow for little or no profit margin; many paging carriers are operating at a loss. See, *e.g.*, Celpage Comments at 9, 11-12. Due to the intense competition in the paging industry, many paging carriers will be unable to recoup their payments to the Universal Service Fund from subscribers. See id. It is well settled that government regulation that deprives carriers of any return on their investment constitutes a violation of the carriers' constitutional rights. See, *e.g.*, Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396 (1920); No. Pacific Ry. Co. v. North Dakota, 236 U.S. 585 (1915).

B. Petitioners will Suffer Irreparable Harm if Stay is Not Granted.

If paging carriers are forced to begin making contributions to the FCC's multi-billion dollar Universal Service Fund, they will be irreparably harmed. As previously indicated, paging companies operate with very little, if any, profit margin. Even a small increase in the low rates

charged by paging companies will constitute a fairly large percentage increase that consumers are unlikely to pay. Indeed, recent FCC regulatory actions have compounded this likely harm, since customers can turn to PCS, cellular, and other Fund-eligible carriers for paging services. Since those carriers will be eligible for Universal Service support, unlike paging carriers, they will have a competitive incentive to absorb those costs until local paging competitors are driven out of business.

Therefore, independent paging carriers such as Celpage will find it difficult, if not impossible, to pass the costs of Universal Service contributions through to subscribers without the loss of customers and customer goodwill; in many cases, paging carriers will be forced to price services *below* cost. These losses constitute irreparable harm. See, *e.g.*, Multi-Channel TV Cable Co., *supra*, 22 F.3d at 552; Basicomputer Corp., *supra*, 973 F.2d at 512; Federal Leasing v. Underwriters at Lloyd's, 650 F.2d 495, 500 (4th Cir. 1981), citing, Blackwelder Furniture Co. v. Selig Manufacturing Co., 550 F.2d 189, 197 (4th Cir. 1977) (loss of business reputation and customer goodwill constitutes irreparable harm; "such damage is incalculable -- not incalculably great or incalculably small, just incalculable").

Due to the low margins under which paging companies operate, the requirement of making substantial contributions without an ability to recoup those contributions will jeopardize the very existence of many paging carriers as going concerns. The destruction of a business is clearly an irreparable harm warranting a stay. See Holiday Tours, *supra*, 559 F.2d at 843, n. 2. Once a company's very livelihood has been destroyed, there is no way that an appellate decision in its favor can restore that company, its shareholders, or its creditors to the *status quo ante*.

For paging carriers, the Universal Service contribution rules are not "mere" economic

injuries for which they can be compensated. The losses these carriers will suffer absent a stay will never be restored; that is the crux of irreparable harm. The magnitude of this harm weighs in favor of staying the Universal Service rules pending judicial review. Celpage and Petitioners have at least demonstrated "serious legal questions" on the merits; and, the harm if the Universal Service rules are not stayed will be severe, certain and irreparable.[3]

C. **Third Parties will not be Harmed by a Stay.**

As Petitioners note in their Motion for Stay, no third parties will be harmed by a stay pending appeal of the Universal Service order. That lack of harm is particularly evident for a stay of the rules as applied to paging companies. These companies have not previously been required to contribute to any form of Universal Service subsidy; consequently, staying the beginning of collections from paging companies will not have any effect on rates for any supported telecom services. Rather, a stay will merely preserve the *status quo* pending appeal.

Indeed, as Petitioners point out, it would be detrimental to the intended beneficiaries of Universal Service to begin requesting services based upon the expectation that much of the costs of those services will be borne by the Fund, only to find that the requested services are priced beyond their means as all or part of the Report & Order is overturned by the Court. See Petition at 29-30.

Moreover, the costs of the Universal Service rules will impose substantial burdens on consumers in the form of rate increases for various telecommunications services. As Celpage and others have pointed out, the increased cost to paging subscribers is likely to be between

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[3] The harm is likely to be compounded by States that will impose similar Universal Service fees on paging carriers, based on the FCC's Report & Order.

$1.00 and $3.00 per unit - a very substantial increase over the current average monthly rate per unit. For many customers, paging represents their most cost-effective link to the nation's communications network; for some customers, paging services are their *only* link to that network. The costs of paging contributions to the FCC's Universal Service program will harm paging customers as surely as it will harm the companies who serve them.

In their comments on the "interim filing freeze" in WT Docket No. 96-18, many paging carriers informed the Commission in detail of the identities and needs of their paging subscribers. See, e.g., WT Docket No. 96-18 and PP Docket No. 93-253, Comments of Metrocall, Inc., at 8-9 (filed March 1, 1996); Comments of Morris Communications, Inc., at 2-3 (filed March 1, 1996). Many hospitals, ambulance services, police departments, fire departments and other organizations responsible for the public health, safety and welfare subscribe to paging services, for multiple units, as the most efficient and cost-effective means of emergency communications. Id. Consequently, a stay of the rules that would increase paging rates for these vital public services will help, not harm, third parties.

Likewise, low-income consumers often rely on paging services because the rates for this most competitive of telecommunications services are so affordable; in some cases, paging provides the primary form of communications service for those consumers. For example, in Puerto Rico, Celpage's alphanumeric paging services help to fill in the substantial gaps in basic telephone service coverage. Puerto Rico has the lowest landline telephone penetration rate in the United States; however, Commercial Mobile Radio Services, including Celpage's paging network, provide ubiquitous coverage of the island. The FCC's Universal Service regime is likely to place the most affordable means of communication - paging - outside the reach of low

income consumers in Puerto Rico. Those consumers' rates will not be subsidized by the FCC's Universal Service regime; rather, they will be burdened with additional costs to subsidize services to other consumers who may well not be as financially needy. The deprivation of basic communications services that will be imposed upon the most economically disadvantaged members of society by the current Universal Service rules would be prevented (or at least forestalled) by a stay of those rules pending judicial review.

D. The Public Interest will be Served by a Stay.

For the reasons stated in the preceding section, Celpage respectfully submits that a stay of the Universal Service rules will serve the public interest by maintaining rates for telecommunications services at their current levels. In particular, a stay will prevent the costs of paging services from escalating beyond the reach of low-income consumers and public organizations that rely heavily on those services for their communications needs.

Moreover, to the extent that paging companies cannot pass on their Universal Service contributions to their subscribers through rate increases, or lose subscribers due to those rate increases, their businesses will likely be destroyed. Paging is, as the Commission has noted, a highly competitive industry. See Second Report and Order in WT Docket No. 96-18 and PP Docket No. 93-253, FCC 97-59, at ¶ 88 (released February 24, 1997). That competition serves the public interest by ensuring high-quality services at low prices. If paging companies are put out of business by the costs imposed by the Universal Service rules pending appeal, the benefits to the public engendered by the competitive paging market will be irretrievably lost.

Conclusion

For all the foregoing reasons, Celpage respectfully requests that the Commission stay the Universal Service rules adopted in the Report & Order in their entirety, pending judicial review.

Respectfully submitted,

CELPAGE, INC.

By: _____
Frederick M. Joyce
Christine McLaughlin

Its Attorneys

JOYCE & JACOBS, Attys. at Law, L.L.P.
1019 19th Street, N.W.
Fourteenth Floor - PH2
Washington, DC 20554
(202) 457-0100

July 18, 1997

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EXHIBIT ONE

United States Senate
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
WASHINGTON, DC 20510-6125

May 1, 1997

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20036

Dear Chairman Hundt:

The Commission must shortly consider rules to implement the revised approach to universal service funding called for by the Telecommunications Act of 1996. Although not required by the statute, the Commission will also concurrently consider reform of its access charge rules.

Access charges currently contain implicit subsidies used, in part, to maintain universal service. The Telecommunications Act requires the Commission to identify these implicit universal service subsidies, make them explicit, and allow them to be recovered by eligible carriers, all of whom are also to contribute to universal service in an equitable and nondiscriminatory manner. The development of local telephone competition makes competitively fair and economically rational restructuring of universal service funding and access charges imperative.

We write today because we are concerned that some of the initiatives under consideration by the Commission appear inconsistent with fair and rational restructuring.

Proposals to raise the federal Subscriber Line Charge (SLC) on multiline business and residential subscribers are particularly troubling. In the first place, increasing the price of Internet connections by subjecting them to the access charge regime would not be in the public interest. To the extent multiple lines are used for Internet connections, raising the SLC would effectively raise the price of Internet connections. This type of increase would be discriminatory in terms of its impact on a particular technology and also in having a disproportionate effect on small business. Whether the FCC raises Internet connection rates by subjecting Internet connections to access charges or by raising the multiline SLCs for residences and businesses, the bottom line is the same -- rates are going to go up.

Proposals to tax wireless service providers an extra $1.00 per month are similarly flawed. Taxing only wireless service providers and subscribers is discriminatory in terms of both technology and impact. The discriminatory impact will be felt most severely by smaller paging

companies and their subscribers, whose monthly bills currently run in the $4 to $7 range. Regardless of the precise amount at issue or the way it is imposed, however, the fact that paging companies are ineligible to draw from the universal service fund only emphasizes that they are not being treated in an equitable and nondiscriminatory manner. Any universal service funding obligation imposed on paging must reflect the fact that paging companies do not use telephone network facilities in the same way as local exchange carriers and other voice carriers.

We recognize the problem the Commission is facing. The Commission appears to be attempting to find a way to fund the Joint Board-recommended $2.25 billion annual new subsidy to provide internal Internet connections to schools and libraries, plus indeterminate added amounts for advanced telecommunications for health care facilities and low-income individuals. You understand the will of the Congress that the FCC not raise telephone rates to do this. So, to avoid raising rates for the single-line residential telephone subscriber, the Commission is apparently going to raise the rates that multiline residential, business and wireless subscribers will pay.

This is unacceptable. This plan appears designed to raise the revenue necessary to fund new universal service subsidies rather than to rationally restructure either access charges or existing universal service funding. We have previously cautioned you that any attempt by the Commission to implement one portion of universal service funding, without coherently and comprehensively implementing all parts of it, will not be economically rational, will unavoidably discriminate against some companies and subscribers, and will therefore fail to comply with the clear and unmistakable terms of the statute. It lessens neither the economic nor the legal pitfalls of so proceeding to say that the Commission would only be raising some subscribers' rates to pay for universal service, but not others'.

At the Universal Service Fund hearing the members of this Committee gave the Chairman what we considered to be a clear message. Congress did intend, and Congress does intend, all the provisions of Section 254, including existing subsidies for rural and high cost areas as well as the new subsidies for discounted rates for Internet connections for schools, libraries, and health care facilities, to be implemented by the Commission. At the same time, Congress did not intend, and does not intend, the FCC to raise telephone rates -- any telephone rates -- to do so.

If, after carefully studying universal service implementation for [illegible] universal service funding that complies with the clear provisions of the Act cannot be implemented without raising telephone rates or otherwise distributing the costs of providing universal service in a discriminatory and unsound manner, the Commission must not implement flawed final rules simply to meet the May 8 deadline, regardless of the cost. Instead, the Commission should adopt final rules whose